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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA,) No. CR 16-00440 WHA
15 Plaintiff,)
16 v.) **UNITED STATES' MOTION IN LIMINE NO.**
17 YEVGENIY ALEXANDROVICH NIKULIN,) **FOUR TO PRECLUDE REFERENCES TO**
18 Defendant.) **EXTRADITION, CONFINEMENT, MENTAL**
19) **COMPETENCY AND PUNISHMENT**
) Trial: March 9, 2020
) Pretrial Conference: February 19, 2020
) Time: 1:30 p.m.
) Courtroom No. 12

21 **I. INTRODUCTION**

22 The government moves to preclude, as irrelevant and prejudicial, any reference by the defense to
23 the following topics: (1) defendant's arrest and extradition; (2) defendant's pretrial confinement; (3) the
24 prior competency proceedings and defendant's mental condition; and (4) potential punishment. As
25 further explained below, each of these topics is irrelevant under Fed. R. Evid. 401. Moreover,
26 interjecting facts about any of these topics is likely to confuse the issues and mislead the jury. *Cf.* Fed.
27 R. Evid. 403. Therefore, the government seeks a pretrial ruling that none of these topics may be
28 mentioned at any phase of the trial, including jury selection, opening statements, examination of
U.S. MIL NO. 4 RE EXTRADITION, ETC. __

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1 witnesses (including defendant's examination, if he elects to testify), and summation.

2 **II. ARGUMENT**

3 **A. Evidence Relating to Extradition, Confinement, Competency Proceedings, and**
Punishment is Not Relevant Evidence.

5 Relevant evidence means "evidence having any tendency to make the existence of any fact that
 6 is of consequence to the determination of the action more probable or less probable than it would be
 7 without the evidence." Fed. R. Evid. 401. Defendant is charged with nine federal offenses for conduct
 8 that occurred in 2012 and 2013. The government's case will rely heavily on evidence gathered roughly
 9 contemporaneously with the charged hacks. At a basic level, it is difficult to see how facts and evidence
 10 related to proceedings in 2018 and 2019—years after the charged conduct—can make the allegations in
 11 the Indictment more or less probable.

12 Additionally, the topics the government seeks to preclude relate to legal issues decided by the
 13 judge, as opposed to fact issues for the jury. It is black-letter law that a finding of competency is not
 14 admissible. 18 U.S.C. § 4241(f) ("A finding by the court that the defendant is mentally competent to
 15 stand trial...shall not be admissible as evidence in a trial for the offense charged.") Likewise, it is well-
 16 settled that jurors should decide guilt without reference to punishment. *See Rogers v. United States*, 422
 17 U.S. 35, 40 (1975) ("the jury [has] no sentencing function and should reach its verdict without regard to
 18 what sentence might be imposed"). As for extradition and pretrial detention, these are matters governed
 19 by different legal standards and committed to the sound discretion of the court. *See* 18 U.S.C. § 3142;
 20 *Matter of Extradition of Kraiselburg*, 786 F.2d 1395, 1399 (9th Cir. 1986) (discovery in an international
 21 extradition hearing is limited and lies within the discretion of the magistrate). In short, defendant should
 22 not be allowed to bring up topics that are far afield from the elements of the charged offenses. To do so
 23 would waste time and distract from the issues at hand.

24 **B. Admission of Evidence Relating to Extradition, Confinement, Competency**
Proceedings, and Punishment Is Likely to Cause Unfair Prejudice and Confuse and
Mislead the Jury

26 Even if references to the foregoing topics were somehow relevant, they should be precluded
 27 under Fed. R. Evid. 403 because any probative value is substantially outweighed by the danger of unfair
 28 prejudice, confusing the issues, and misleading the jury. Courts strive to focus jurors on their chief role

1 as finders of fact; it is error to put before the jury “any considerations outside the evidence that may
 2 influence them, and lead to a verdict not otherwise possible of attainment.” *See United States v. Frank*,
 3 956 F.2d 872, 879 (9th Cir. 1991) quoting *Miller v. United States*, 37 App. D.C. 138, 143 (1911).

- 4 • **Arrest and Extradition.** Defendant is a Russian national who was arrested in Prague in October
 5 2016, held in Czech custody, and then extradited to the United States in March 2018. There
 6 were a number of press articles about the arrest and extradition. *E.g.*, Ivana Kottasova,
 7 *Suspected Russian hacker extradited to US, faces cyber criminal charges*, CNN, Mar. 30, 2018,
 8 <https://www.cnn.com/2018/03/30/politics/yevgeniy-nikulin-linkedin-extradition/index.html>.
 9 Some articles speculated that the timing of Nikulin’s arrest had to do with his suspected
 10 involvement in Russia’s hacking activities related to the 2016 U.S. presidential election. *E.g.*,
 11 Robert Tait, *Alleged hacker held in Prague at center of ‘intense’ US-Russia tug of war*, THE
 12 GUARDIAN, Jan. 27, 2017, <https://www.theguardian.com/technology/2017/jan/27/us-russia-hacking-yevgeniy-nikulin-linkedin-dropbox>. Nikulin is not charged with any such conduct and
 13 the government does not want to interject complex and politically charged issues into this trial.
 14 The government does not plan to elicit any testimony about the arrest or extradition and asks that
 15 the Court require defense counsel to abide by the same restriction.
- 16 • **Pretrial Confinement.** Defendant has been in pretrial custody awaiting trial in this matter. It is
 17 possible that defense counsel might reference this fact directly or indirectly, in an attempt to
 18 elicit sympathy for defendant, or imply that he has already been punished. That would be
 19 improper, and the government respectfully requests that the Court make clear that custodial
 20 status is not to be mentioned.
- 21 • **Prior Competency Proceedings and Defendant’s Mental Condition.** Defense counsel first
 22 raised concerns about defendant’s competency to stand trial at a status conference in June 2018.
 23 Between August 2018 and May 2019, the parties litigated competency. (See ECF 49, 50, 94.)
 24 During the proceedings, defense counsel asserted that defendant suffers from Posttraumatic
 25 Chronic Stress Disorder; Psychotic Disorder, Not Otherwise Specified; and Dissociative and
 26 Conversion Disorder, Not Otherwise Specified. The Court ultimately found that these diagnoses
 27 lacked credibility and held defendant competent to stand trial. (ECF 94.) Defendant has not
 28

1 notified the government of an intent to introduce evidence of defendant's mental condition at
2 trial, as is required under Fed. R. Crim. P. 12.2(b). No psychiatrist or other medical professional
3 appears on defendant's witness list. (ECF 134.) Accordingly, there is no reason that any
4 reference should be made to defendant's mental disorder. To allude to his condition in any way
5 would likely mislead the jury.

6 • **Punishment.** Evidence about punishment opens the door to compromise verdicts and confuses
7 the issues to be decided. *See Frank*, 956 F.2d at 879. That is why the Model Jury Instructions
8 for the Ninth Circuit include an explicit instruction that jurors "may not consider punishment in
9 deciding whether the government has proved its case." Instr. 7.4. Courts routinely grant
10 motions *in limine* to preclude any references to punishment, recognizing that if a jury hears
11 anything about the potential negative consequences of a guilty verdict, the "bell" cannot be un-
12 rung or the damage neutralized by a curative instruction. The government respectfully requests
13 such a ruling here.

14 **III. CONCLUSION**

15 For the reasons stated above, the United States respectfully requests that the Court preclude any
16 reference to (1) defendant's arrest and extradition; (2) defendant's pretrial confinement; (3) the prior
17 competency proceedings and defendant's mental condition; and (4) potential punishment.

18 DATED: January 22, 2020

Respectfully submitted,

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21 /s/
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